No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States

RALPH BAKER, et al.,

Petitioners,

v.

POWELL MOUNTAIN COAL COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES PRESENTED:

1. WHETHER THE CIRCUIT COURT OF LEE COUNTY, VIRGINIA AND SUBSEQUENT THE SUPREME COURT OF VIRGINIA DENIED APPELLANTS SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW BY DEPRIVING THEM OF THEIR PROPERTY CONTRARY TO THE APPLICABLE LAWS OF THE COMMONWEALTH OF VIRGINIA?

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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

RALPH BAKER, et al.
Appellants,

v.

POWELL MOUNTAIN COAL COMPANY,
Appellee.

Virginia Supreme Court Record No. 112551
Lee County, Virginia Circuit Court No. L9702-28

PETITION FOR A WRIT OF CERTIORARI WITH MEMORANDUM OF LAW

COMES NOW the Petitioners, Ralph and Geneva Baker, and petitions this court to determine whether the Supreme Court of Virginia has violated the Petitioner's constitutional rights of substantial due process of the law and equal protection of the law pursuant to and 14th Amendment of the United State Constitution. The Supreme Court of Virginia issued an Order dated February 28, 2002 refusing the petition for appeal filed by appellants here.

I. CONSTITUTIONAL CITATION

AMENDMENT XIV (1868) of the United States Constitution.

"nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws."

II. STATEMENT OF JURISDICTION

Jurisdiction of this court is founded upon 28 U.S.C. section 1257(a) pursuant to the Final Order of the Supreme Court of Virginia dated February 28, 2002.

III. STATEMENT OF THE CASE

The Circuit Court of Lee County and subsequently the Supreme Court of Virginia without appropriate authority of Virginia law to support their decision deprived Mr. and Mrs. Baker of their ownership of the mineral, coal, located under the surface of real property held by the Bakers by record title and by adverse possession. The Bakers contend that their property right cannot be taken away by ignoring the precedent of the law without a reasoned opinion to show that the intent of the Court was to decide the cases contrary to the law as it stood prior to the court's decision.

The hearing and subsequent final orders entered by the Circuit Court of Lee County on August 16, 2001 and subsequently refusal of review by the Commonwealth of Virginia Supreme Court on February 28, 2001 is the question presented by this petition. The Final Order appealed from was the first part of a bifurcated hearing in a Motion for Judgement filed on February 28, 1997. Said Motion asked for damages caused to the property and/or property rights of appellants by the trespass and unlawful removal of coal from the subsurface of the property claimed by appellants in Coopers' Hollow of the Pocket Section of Lee County by the appellee, Powell Mountain Coal Company. At the hearing counsel for appellee did concede that the Bakers have record

title to the surface and all minerals except coal. The Final Order entered was dispositive to the case and thus, ripe for appeal.

The appellants claim that they hold all property rights by record title and/or through their predecessor's in interest adverse possession of the surface and subsurface of the lands in question, by hostile, open, active, exclusive, and continuous commercial mining of the coal underlying the surface for the required time and at a time. The appellants' rights pursuant to adverse possession vested before appellee or their predecessors in interest could have occurred. Additionally, the appellants held the property in fee against all others since 1911.

If it had been determined that the Bakers had rights to the coal underlying the Baker property a later hearing would have determine that amount of damages caused by that trespass and mining.

Pursuant to the actions of Powell Mountain, Ralph and Geneva Baker filed a Motion for Judgement against appellee, Powell Mountain Coal, Inc. on February 28, 1997.

After proper preliminary procedures, evidence was presented at a ore tenus hearing on December 27 and 28, of 2000, before the Circuit Court Judge J. Robert Stump sitting for the Lee County Circuit Court, Virginia.

The appellants produced evidence necessary to meet all the requirements for their predecessors in interest to adverse possess said property for more than ten years prior to 1935. Also, they produced evidence to show defects in the F.A. Stratton deed sufficient to any attempt to sever the coal before 1887. Appellee agreed that the appellants held record title, and produced no evidence to contradict appellant's evidence as to adverse possession of the fee. Appellee asserts that appellants were estopped by deed to claim ownership of the coal under the surface. Judge Stump allowed written closing arguments through post-trial briefs. Pursuant to the

ore tenus hearing and post trial briefs, Judge Stump issued a preliminary decision on July 13, 2001, stating that appellants had presented insufficient evidence that there was a defect in the William Pennington 1887 coal severance deed to F.A.Stratton. He further stated that the appellants were estopped by deed to deny the validity of title held by appellee, which appellants had failed to prove by clear and convincing evidence adverse possession of the fee including the coal under the Cooper Hollow Property. He ruled that appellee held record title to the coal under the Cooper Hollow property pursuant to the severance deed and had acquired ownership of the coal by adverse possession through mining the coal. Therefore, Judge Stump granted Powell Mountain's Motion to Strike appellants evidence.

Pursuant, to the Judge's preliminary decision, appellants filed a Motion for the Court to Reconsider. Appellee filed a Motion for Entry of Order. A hearing was set and was held on August 16, 2001 in the Lee County Circuit Court with Judge J. Robert Stump presiding. At that hearing, Judge Stump denied appellant's motion and a Final Order was entered.

Counsel for appellants filed a Notice of Appeal with the Supreme Court of Virginia on September 20, 2001. On February 28, 2002, the Supreme Court of Virginia refused the petition for appeal. No motion to reconsider was filed.

III. FACTS DEVELOPED AND PRESENTED AT TRIAL

A. EVIDENCE AND LAW AS TO THE ISSUE OF TITLE

The necessary deeds to show the official historical record of the owners or claimed owners of the lands in questions were introduced by and through the pre- trial briefs and the testimony of Lisa McConnell, Esquire.

At no time was there any contention by the appellee that

the Bakers did not own the surface and subsurface except for the coal of any of the five tracts that make up the total of the Baker's tracts by record title dating back until 1911, and that was accepted by all as the law of the case.

The Baker's position relative to their land title in the trial was that they have fee simple ownerships in all the property know as the Baker Tracts in Cooper Hollow due to the adverse possession of the fee of their predecessors in title. Ms. McConnell testified that the five tracts held by the Bakers are all contiguous including the Samp Baker tract and the Rowlett tract.

The Bakers claim that they have color of title to the whole totality of the land by paper title from people who received their title thorough adverse possession; that having adverse possession to the surface with no valid severance deed, adverse possession of the surface would give them fee simple ownership of the property, including the rights to the coal. (*See e.g.* Interstate Coal & Iron v. Clintwood Coal and Timber, *105 Va. 574, 54 S. E. 317, 1906)*.

Powell Mountain claims the severance deed is valid by 1) estoppel by deed and 2) as supported by exceptions listed in deeds.

In Mountain Mission School V. Mary Preston White, 204 Va. 256, 130 S.E. 2d 452 (1963) the court held that a legislative provision could not cure an evident due process problem. Thus, time and deed exceptions cannot grant to the grantee or their successors in interest property taken without due process of law. The legal principal of equitable estoppel as advanced by the appellee is no more a legal curative that would work to violate the rights of due process and equal protection under the law of individuals any more than could a legislative provision.

Appellee further claimed that appellants had notice of the exception of coal by deed. However, the case law in Steinman Coal V. Mary Jane Fleming, 145 Va 731, 134 S.E. 696 (1929), indicates that an exception of coal in a deed does not strengthen any claim for ownership. The court therein noted that it is clear from the language in the exception that the clause constitutes an exception not to the grant of land but to the warranty.

The Stratton Severance deed recorded in the Lee County Circuit Court Clerk's Office in Deed Book 22 at Page 205, purports to sever the coal right only. Powell Mountain Coal claimed record title to the coal rights pursuant to that severance deed. The severance deed is not valid because none of the grantors listed in said deed ever owned the land in fee simple absolute; thus, could not sever the coal rights as attempted by the Stratton Severance deed.

A severance deed must be signed by all the co-tenants to be valid. Virginia Coal and Iron Co v. Richmond and Clinchfield Coal, 128 Va 258, 104 S.E. 805 (1920), and an insufficiency in a deed would constitute an invalid conveyance. Pocahonas Fuel v. Villian, 164 Va. 301, 170 S.E. 616 (1933).

If a person having a colorable title enters upon a vacant property claiming possession and title to the whole tract then his possession is co-extensive with his boundaries. Honaker Lumber Co. v. Kiser, 134 Va 50, 113 S.E. 718 (1922). The Bakers predecessors claim the whole tract and boundary of their property. Thus, their adverse possession of the whole went to the boundaries of said property. The owner of the surface whether by title or by adverse possession is the owner of the fee and if anyone claims a severance then they must prove the valid severance. Interstate Coal and Iron v. Clintwood, 105 Va. 574, 54 S.E. 593 1905). Appellee presented no evidence to prove ownership by valid title or by adverse possession. By law,

Powell Mountain could not adverse possess the coal. If there is no valid severance deed, only the surface owner can adverse possess the coal. Davis & Others v. Bostic and Others, 125 Va. 69, 100 S.E. 463 (1919).

The severance deed from the beginnings was void. Thereafter, property rights remain vested with the original heirs of Benjamin Dickenson as fee simple. A record title of any conveyance by the Dickenson heirs fails to convey anything other than an undivided interest and any court efforts to convey the property fails. The record title was broken with the Dickenson heirs.

Adverse possession of property is just as good a title as a grant from the Commonwealth. McClanahan Adm. v. N. & W. Railroad, 122 Va. 705, 96 S.E. 453, (1918).

Any owner of record or by adverse possession under color of title took the property in fee simple absolute. The owner of the surface whether by title or by adverse possession is the owner of the fee as held by Interstate Coal, supra. If a person or persons have adverse possession of the surface without a valid severance prior to acquiring by adverse possession, as in this case, then ownership of the fee is vested. Virginia Co & Iron v. Hylton, 115 Va 418, 79 S.E. 337. (1933).

The Bakers do not say that any issue of any severance deed that may have been granted to the coal under this land came from the same valid chain of title. However, a person does not have to trace color of title to a deed, but can trace to adverse possession supported by color of title. Buchanan v. Heirs of Smith & Banks, 115 Va. 704, 80 S.E. 795 (1914). The land was severed from the Commonwealth by the original patent to Nathan Fields and the chain was clear through the vesting of the land in the Dickinson heirs, but thereafter it became so clouded as to be broken. Once severed from the

Commonwealth, the land was subject to having a new chain of title being created by adverse possession in someone adverse to the apparent or undecipherable record owner.

Even though most cases say that the claimant under adverse possession has got to go back to the common grantor and in those cases the common grantor was there, this particular case is one of those in which you have a broken chain of title in which the defendant is claiming title under one deed stemming from one grantor, and the appellants are claiming under another chain of title stemming from the adverse possession of his predecessors in title. (Similar to someone claiming under a land grant from the King of England and another claiming from a grant from the Commonwealth.)

We agree that the law normally calls for the parties to go back to a common grantor, but it is our position that chains of title can be broken by invalid grants or in other ways (A Cherokee or Creek Indian claiming land under tribal rights, or someone claiming rights through a grant from the King of England today would not necessary have the same chain of title or "common grantor" as a modern day property owner in Lee County. Likewise in the case of two claims to the same land in West Virginia, one claiming from a grant from the Commonwealth and one claiming from a post 1863 grant for the State of West Virginia.).

At the hearing, the appellee tried to show title to the coals from a severance deed dated before 1887, the appellants produced through the adverse possession of their predecessors in title, that they also have title to all subsurface rights, the coal by reason of the adverse possession of the coal by their predecessor in title obtained by the actual, open, notorious, exclusive, active, hostile and adverse possession of the coal as shown by the continuous commercial mining thereof for over

ten years between 1911 and 1937. Thereafter, there is no evidence to prove a common source of title.

Appellee and their predecessors in interest knew of this problem because an early abstract prepared by them indicated the problem of the broken chain of title.

The only partition suit filed and introduced at trial was a suit filed by William Pennington before 1900. Appellants assert that a partition suit must hold strictly to the statutory law to have a valid partitioning. Phillips v. Wells, 147 Va. 1030, 113 S.E. 616 (1933). Appellee did admit at the hearing that this suit does not convey any interest to Mr. Pennington from the Dickinson heirs, but of importance to us that suit by Mr. Pennington asserts that the land had never been petitioned prior to 1872 which further supports appellant's claim that Mr. Pennington did not have fee simple ownership of the property from which he attempted to sever the coal, and all the court records relevant were put into evidence which further proves no ownership of the fee by Mr. Pennington.

Appellants proved by evidence presented and expert testimony that they hold the said described property from 1911 until now in fee simple. They and their predecessors in interest pursuant to record title used the land in question in a way to indicate they considered their ownership of the land in fee simple and they were holding it openly, exclusively, notoriously, actively and in a hostile manner, under color of title in fee simple. The land was used to farm, live on, timber, hunt, raise domestic animals, mine commercial coal, and defend against previous claims of ownership of mineral rights. In addition , the Plaintiffs and their predecessors in interest all paid taxes assessed against them on said property, including taxes on minerals.

B. EVIDENCE OF ADVERSE POSSESSION

Pursuant to Interstate Coal & Iron Co. v. Clintwood & Timber Co., 105 Va 574, 54 S.E. 593, and later cited in Ventro v. Clinchfield, 199Va. 943, 103 S.E. 2d 254 (1958) the court restated the proposition that the title to the freehold of the one, either in the surface or the minerals, cannot be acquired by adverse possession of the other, and the purchase of the outstanding title by the one does not enure to the benefit of the other. Thus, Powell Mountain if they held a valid severance deed could not adverse possess the Baker's property unless they had been able to oust the Bakers or their predecessors in interest. Conversely, the Bakers and their predecessors could not adversely possess the coal unless they were able to oust the appellee. That is exactly what the Bakers and their predecessors did. They commercially mined coal in an open, hostile, continuous, active, and exclusive manner to such extent that they were able to adversely possess the coal.

Ms. McConnell, appellants expert witness, testified that because of the lost proceedings and the absence of deeds of record, she could not certify the severance deed in question as valid.

In her prior testimony, she testified that she did not find any severance deed of coal to anybody except the F. A. Stratton severance deed and that from her title research she only found William Pennington, grantor in the Stratton deed, to have an undivided interest as a co-parcener in the tract of land, and that all of the parties who held interest in the entire tract of land would have had to sign the severance deed for it to be valid. Virginia Coal & Iron Company v. Richmond and Clinchfield Coal, 128 Va. 258, 104 S.E. 805 (1920).

In regard to this matter, the Appellants presented

extensive mostly unrequited evidence of the commercial mining activities of their predecessors in title for 1911 to 1938 and beyond.

Powell Mountain claims that it had obtained the right to mine the coal under the entire Pennington/Stratton boundary by right of its own adverse possession due to the "extensive mining of coal" by Powell Mountain and its associates in the past, but not on the Baker Tracts prior to 1989.

Powell Mountain also admitted that they had not mined under the Baker tracts, and that their mining under the Pennington/ Stratton tract was on different seams of coal from the coal mined by Samp and Freeman Baker, the appellant's predecessors in title.

Powell Mountain asserts that the mining complained of herein was primary land under which appellants predecessors did not mine, but rather under land which they obtained in 1969 from Harry Rowlett, Trustee. They do admit some mining under the Baker tracts since 1989.

IV. ARGUMENTS:

A. SUBSTANTIVE DUE PROCESS ARGUMENT

To support a claim of a violation of substantive due process the appellants must show that (1) they had property or a property interest (2) of which they were deprived (3) without due process of law. It is further recognized that the standard would be strict scrutiny as a measure of a state's excessive action("that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency"). BMW of North America, Inc., v. Ira Gore, Jr.517 U.S. 559; 116 S. Ct. 1589; 134 L.E.d. 2d 809,

1996. Aubrey E. Henry, v. The Jefferson County Planning Commission, 2002 U.S App. Lexis 8803, May 2002. Sylvia Development Corp. v. Calvert County, 48 F.3d 810, 827 (4th Cir. 1995); and Ruth O. Shaw, et al., v. James B. Hunt, Jr., 517 U.S. 899; 116 S.Ct. 1894; 135 L.Ed. 207; 1996.

Herein, the Circuit Court of Lee County, Virginia and subsequently the Supreme Court of Virginia deprived the Bakers of their right to coal located in the subsurface of the real property owned by them. As noted, they owned the property by record title and by their claim of adverse possession. Clearly, the appellants had an ownership interest in the surface property and through the adverse possession of the coal in the subsurface. Under the reasoning of Sylvia, supra, it would seem that the appellants meet the first criteria of the standard of review for substantive due process.

The courts ruled against appellants contrary to very well-established state laws regarding validity of deeds, record title and acquisition by adverse possession. They made their decision by use of a legal rule of construction resulting in the Baker's being deprived of their real property rights. By not applying the established laws of the Commonwealth, the Bakers did not have the benefit of substantive due process of law and the equal protection of the law for their property rights.

This violation is evidenced by the decision of the Circuit Court of Lee County in that no reason other than operation of estoppel by deed was given for the ruling, the result of which would completely change the Virginia law as to adverse possession and the validity of deed if applied to other such cases.

It is appellants' contend that this action was so significant as to shock the conscious of reasonable persons who come to the state courts with an expectation that the laws and standards

applied to their case will be the same that were applied in the past by the same court. To not do so without more is a deprivation as herein noted.

As a result of the Virginia court's decision the appellee has acquired coal rights which exceeds appellants' claim. The value of the coal under the surface of appellants' property was never established at the hearing, but it can be assumed to be substantial.

The question brought to the state courts was whether the severance deed herein identified was a valid severance deed or alternatively that appellants had ownership of the property in fee, and thus ownership of the coal. The appellees are saying that since the severance deed had not been challenged in more than 100 years that the appellants are estopped by deed. However, the appellants or their predecessors in interest had claimed the entire fee of the same property since at least 1910. That included the right to mine coal for sale which they did in the early part of the century as indicated by the evidence presented at the hearing.

It was brought to the attention of the Circuit Court and the Supreme Court of Virginia that a legislative provision or a legal construction by the court cannot cure an evident due process problem. Mountain Mission, supra. Estoppel can never serve to waive the appellant's constitutional rights as herein noted. The court's decision flies in the face of fairness for appellants and exceeds limits on appellants' ownership and use of their real property and all indicia of title.

B. EQUAL PROTECTION ARGUMENT

For years there have been disputes over the ownership of coal lands in the central Appalachians.

As noted, under substantive due process, strict scrutiny is required to let the laws of the Commonwealth apply appropriately. Here the application of the laws of the Commonwealth were ignored resulting in a substantive due process and equal protection under the law violation of appellant's constitution.

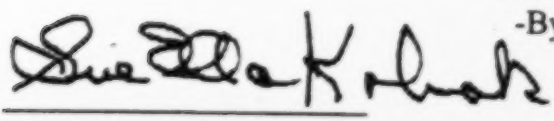
The right to ones personal and real property is an important right recognized by the United States Constitution. M.L.B. v. S.L.J., 519 U.S. 102 (1996) recognized that termination of parental rights has a significant impact on the family relationship. Appellants assert that their property rights deserve the same strict scrutiny of the state court system. This court must inspect the character and intensity of the appellant's property interest and the state court's justification for its action. M.L.B. v. S.L.J., supra.

CONCLUSION

The Circuit Court of Lee County and the Supreme Court of Virginia denied appellants of their substantive due process and equal protection under the law rights as provided in the Fourteenth Amendment of the United States Constitution. Appellants had a significant property right and had every reason to assume that the laws of the Commonwealth of Virginia would apply.

That did not happen herein. The Circuit Court gave no reasoned opinion and on the face of the Final Order determined that by operation of deed the appellant's property rights were extinguished.

RALPH BAKER
-By Counsel-



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